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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOSEPHINA PELAYO,

Plaintiff and Appellant,

v.

PACIFIC MARITIME ASSOCIATION ,

Defendant and Respondent.

D037595

(Super. Ct. No. 725736)

APPEAL from a judgment of the Superior Court of San Diego County, William C. Pate, Judge. Reversed.

Plaintiff Josephina Pelayo appeals a summary judgment in favor of defendant Pacific Maritime Association (PMA) in Pelayo's action for disability discrimination in violation of the Fair Employment and Housing Act (Gov. Code,<sup>1</sup> § 12900 et seq. (FEHA)). Pelayo contends the summary judgment was erroneous because the evidence

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<sup>1</sup> All statutory references are to the Government Code unless otherwise specified.

raises a triable issue of fact as to whether she was terminated from her job as a longshore worker because of a perceived disability. She also contends the court erred by granting summary judgment on a ground that was not asserted by PMA and by denying her motion for reconsideration. We reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

PMA is an association of west coast shipping, stevedoring and marine terminal companies that employ longshore workers. PMA acts as payroll agent for the workers and represents its member companies in labor relations with the International Longshore and Warehouse Union (the ILWU), the exclusive collective bargaining representative of the longshore workers employed by PMA's member companies. PMA and the ILWU are parties to a collective bargaining agreement known as the Pacific Coast Longshore & Clerks Agreement (the CBA).

Under the CBA, PMA and the ILWU jointly operate dispatch halls that dispatch longshore workers as needed on a daily basis to perform work assignments as requested by the various employers. The main function of the longshore workers is to load and unload freight from vessels. The CBA provides for the use of both "registered" and "unregistered" workers, who fall into one of four classifications: fully registered or Class A; limited registered or Class B; identified casual; and unidentified extra casual. Identified and unidentified casual workers are unregistered. Longshore work is distributed first to the Class A workers and second to the Class B workers. Any remaining work goes first to identified casual workers and then to unidentified casual

workers. The registration lists in each port are maintained by a Joint Port Labor Relations Committee (the JPLRC) consisting of members of both PMA and the ILWU.

Rules promulgated under the CBA require all longshore workers to pass a physical examination as a condition of employment to ensure they can safely and adequately perform all longshore tasks. A physician appointed by the JPLRC examines the worker in accordance with the "Guide to Industry Entry Physical Examination for Longshore and Marine Clerks' Work," which provides a detailed description of longshore work to enable the physician to determine if the worker is physically and emotionally capable of performing the work without posing a hazard to coworkers or being at substantial risk of injury or illness due to his or her physical condition. Based on the examination, laboratory and X-ray findings, and the worker's medical history, the physician gives the worker an "A," "B," or "C" rating. An "A" rating means the worker is qualified to perform longshore or marine clerk work. A "B" rating means the worker is not qualified to perform such work at the time of the examination due to a correctable condition, and a "C" rating means the worker is not qualified for longshore or marine clerk work.

Pelayo began working at the San Diego port as an unregistered longshore worker in 1983. In January 1997 she was one of a group of identified casual workers who were selected to undergo the process of becoming registered Class B workers. On February 6 she underwent a required pre-registration physical examination by a physician selected by PMA. Based primarily on X-rays of her spine indicating she had moderate scoliosis with pelvic tilt, the examining physician gave her a "C" rating, which meant she was not qualified for longshore or marine clerk work.

On February 21 Pelayo was told she had not passed her physical examination. When she came to work the next day the dispatcher told her that her name had been removed from the list of eligible workers. On March 17 PMA Labor Relations Administrator Karen Fog told Pelayo she was disqualified because of the "C" rating she received from her examining physician and on March 20 Fog sent her a letter to that effect. The letter stated: "You are hereby advised that, if you have any medical documentation which disagrees with the findings, you may submit such evidence within 15 days to the [JPLRC] for forwarding to and consideration by the examining physician. [¶] Failure to do so will finalize your disqualification for consideration for Class 'B' longshore registration."

On March 24 Pelayo saw a different physician for a second opinion about her back condition. The physician diagnosed her as having mild scoliosis and severe degenerative joint disease and stated she needed "consideration of light duty" if her job required heavy lifting, crawling, bending or squatting.

On April 14 Fog sent Pelayo a letter informing her that she was "disqualified for further consideration for Class 'B' registration" based on her "failure to present, within 15 days, medical documentation that disagreed with the original examiner's findings." On April 17 Fog sent a "corrected copy" of the April 14 letter. The corrected letter stated: "[Y]ou are disqualified for further consideration for Class 'B' registration and you shall no longer be eligible for dispatch as an identified casual."

After she was disqualified from further longshore work, Pelayo applied for federal and state workers' compensation disability benefits. In the course of seeking those

benefits, she underwent physical examinations in May 1997, September 1997 and January 1998. The three physicians who examined her each reported she was not disabled and was capable of resuming her duties as a longshore worker. In May 1998 Pelayo submitted to PMA and the JPLRC a written grievance that included the reports of those three physicians. In response, the JPLRC scheduled her for a preemployment physical examination and drug and alcohol screening. In July a PMA-appointed physician examined Pelayo and gave her an "A" rating. On August 28 the JPLRC notified her that based on her most recent physical examination rating, she was eligible to work as an identified casual.

Pelayo filed the instant action in November 1998, asserting causes of action against PMA for disability discrimination and gender discrimination in violation of the FEHA and the Americans with Disabilities Act (42 U.S.C. § 12101 et seq. (ADA)), and a cause of action for retaliatory discharge in violation of federal law.<sup>2</sup> PMA removed the action to federal court, where Pelayo filed a first amended complaint in which she added the ILWU as a defendant, omitted her causes of action for gender discrimination and retaliatory discharge in violation of federal law and added two causes of action for retaliatory discharge in violation of state law.

On cross-motions for summary judgment, the federal court granted summary judgment in favor of PMA as to the ADA portion of Pelayo's first cause of action for

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<sup>2</sup> The original complaint included causes of action by a coplaintiff who, according to PMA, voluntarily dismissed his claims with prejudice.

disability discrimination and as to her second and third causes of action for retaliatory discharge in violation of the FEHA. The federal court denied summary judgment on Pelayo's state disability discrimination claim, finding a triable issue of fact as to whether PMA regarded her as having a disability.

After the federal court issued its summary judgment ruling, the parties stipulated to remand the case to state court, where PMA filed a motion for summary judgment on Pelayo's sole remaining cause of action for disability discrimination under the FEHA. The basis for the summary judgment motion was that PMA disqualified Pelayo from longshore work for the legitimate, nondiscriminatory reason that she failed to appeal her medical disqualification. In opposing the motion, Pelayo argued, mostly in her opposition separate statement of disputed facts, that PMA's written policy of automatically disqualifying employees with certain physical conditions was discriminatory.

In its order granting the motion the court stated: "[PMA's] motion is based on the premise that it had a legitimate, nondiscriminatory reason for terminating her longshore worker status -- her failure to appeal an initial medical determination that she was not physically able to perform the essential functions of her job. It is undisputed that [Pelayo] did not appeal that determination within the specified time period or at all. [Pelayo's] attempt to create a triable issue of fact by focusing on the fact that she was terminated for failing to pass the physical exam, as opposed to failing to pursue an appeal, is unavailing. [PMA's] disqualification of [Pelayo] for failing to pass the physical exam and its subsequent decision to 'finalize' her disqualification after she failed to

appeal are inseparable in terms of the justification for her disqualification and termination."

Additionally, the court noted that Pelayo's counsel at oral argument had focused on PMA's "alleged failure to offer [Pelayo] any accommodation or to initiate an interactive process [to determine whether an appropriate accommodation could be made]." The court rejected Pelayo's accommodation argument based on (1) the federal court's previous determination that she was not entitled to an accommodation because she was not actually disabled but merely regarded as disabled, and (2) her failure to provide evidence that PMA denied a request for accommodation.

Pelayo filed a motion for reconsideration on the ground the court improperly granted summary judgment "on a basis of law not raised or tendered to the Court by the parties in their moving and opposing papers." Specifically, she objected to the court's basing the summary judgment on her failure to present evidence that she requested or was denied a reasonable accommodation. Pelayo contended that due process required she be given a chance to present evidence raising a triable issue of fact as to the accommodation issue.<sup>3</sup> The court denied the motion for reconsideration and entered judgment for PMA.

## DISCUSSION

On appeal from a ruling on a motion for summary judgment, we conduct an independent review of the moving and opposition papers and apply the same standard as

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<sup>3</sup> On the same day she filed her motion for reconsideration Pelayo voluntarily dismissed with prejudice her first amended complaint as against ILWU.

the trial court in determining whether the motion was properly granted. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 873.)

To establish a prima facie case of physical disability discrimination under the FEHA a plaintiff must show that he or she (1) suffers from a physical disability<sup>4</sup>; (2) is otherwise qualified to perform the job; and (3) was subjected to an adverse employment action because of the disability. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) "On a motion for summary judgment brought against such a cause of action the plaintiff bears the burden of establishing a prima facie case of discrimination based upon physical disability, and the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer has done so the plaintiff must offer evidence that the employer's stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated. [Citation.]" (*Ibid.*)

For purposes of its summary judgment motion and this appeal, PMA "has assumed that Pelayo could establish a prima facie case of 'regarded as' disability discrimination." We view PMA's assumption as a concession (for purposes of its summary judgment motion and this appeal only) that the automatic and *complete* disqualification of Pelayo

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<sup>4</sup> The statutory definition of "physical disability" includes being regarded as having or having had one of the specified physical conditions that constitute an actual disability. (§ 12926, subd. (k)(3).)



from longshore work based on the "C" rating she received from the PMA-appointed physician establishes a prima facie showing of disability discrimination under the FEHA. Accordingly, PMA's burden on summary judgment was to offer a legitimate, nondiscriminatory reason for terminating Pelayo's employment. PMA's proffered legitimate reason -- Pelayo's failure to appeal her medical disqualification -- does not qualify as a nondiscriminatory reason because it is directly related to the alleged discriminatory reason for the termination -- i.e., Pelayo's perceived physical disability.

The California Supreme Court has noted that when an employer defends against an employment discrimination claim by asserting a nondiscriminatory reason for the alleged discriminatory employment action, "the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. [Citations.]" (*Guz v. Bechtel National, Inc.*, (2000) 24 Cal.4th 317, 358 (*Guz*), fn. omitted.) For example, if an employee claims an adverse employment action was racially motivated, a legitimate reason for the action would be that the employee's work performance was poor. Poor work performance is facially unrelated to prohibited racial bias and, if it is the true reason for an adverse employment action, precludes a finding of discrimination.

Pelayo's failure to appeal her medical disqualification clearly was not facially unrelated to the disqualification itself, as the two circumstances were directly related and were both substantial factors in Pelayo's loss of employment. Pelayo was disqualified from longshore work because of her physical condition *and* because she did not appeal

her disqualification. PMA acknowledged that fact below, stating in its summary judgment reply papers: "PMA has never disputed that Pelayo was disqualified because she failed the physical exam by receiving a 'C' rating."<sup>5</sup> As PMA's statement reflects, it is undisputed that Pelayo's physical examination results were the root cause of her disqualification. The fact that her ultimate termination was based in part on her failure to challenge the PMA physician's medical findings through an internal appeal process does not controvert the fact that those findings were the fundamental reason for the termination.

The trial court correctly observed that the alleged discriminatory reason for Pelayo's disqualification (her failure to pass the physical examination) and PMA's proffered nondiscriminatory reason (her failure to appeal her disqualification) were "inseparable," but came to the wrong conclusion based on that fact. The court apparently accepted PMA's analysis that because Pelayo's failure to *appeal* her disqualification was not in and of itself a discriminatory reason for "finaliz[ing]" the disqualification, the disqualification was not actionable regardless of whether the initial reason for the disqualification was discriminatory. We reject that analysis. If an employment action is inherently discriminatory, an employee's failure to challenge the action cannot change its

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<sup>5</sup> PMA similarly states in its respondent's brief in this appeal that it "has never disputed that Pelayo was initially removed from the eligibility list because she failed the physical exam by receiving a 'C' rating."

discriminatory nature and serve as a legitimate, nondiscriminatory reason for the action.<sup>6</sup> Because PMA did not offer a legitimate, nondiscriminatory reason for Pelayo's disqualification that was *facially unrelated* to her alleged "regarded as disability" the burden did not shift to Pelayo to raise a triable issue of fact as to whether PMA's proffered nondiscriminatory reason was pretextual.

In contending Pelayo's failure to appeal her medical disqualification constitutes a legitimate, nondiscriminatory reason for her termination, PMA is essentially arguing it cannot be held liable for disability discrimination because, in terminating Pelayo, it followed the medical disqualification policy that was jointly established by management and labor under the CBA. However, that defense argument does not address the central issue raised by Pelayo's disability discrimination claim: Is the medical disqualification policy that PMA followed inherently discriminatory because it allows PMA to terminate

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<sup>6</sup> The following comments by the court at oral argument on the summary judgment motion suggest that it viewed Pelayo's *failure to pass the physical examination*, as opposed to her failure to appeal her "C" rating, as the legitimate, nondiscriminatory reason for her initial disqualification. The court stated: "I couldn't find any evidence of pretext at all in here. There's no liability if the decision is wrong. The liability, *if there's a good basis for doing it initially and they say she's injured, doctor says she's injured, can't perform the job . . .* but then the issue goes beyond that, was *this* a pretextual basis for the termination. There's no evidence that I could find of any pretext by [PMA] and that's why the analysis stopped." (Italics added.)

To the extent the court based its grant of summary judgment on the conclusion that Pelayo's failure to pass the physical examination -- as opposed to her failure to appeal her "C" rating -- was a legitimate, nondiscriminatory reason for her termination, the summary judgment was erroneous because PMA assumed, for purposes of the summary judgment motion, that Pelayo could establish a prima facie case of "regarded as" disability discrimination and, accordingly, did not argue that Pelayo's "C" rating was a legitimate nondiscriminatory reason for her disqualification.

a longshore worker who is perceived to have a disability but is not actually disabled from performing longshore work? To argue that Pelayo's disqualification was in accordance with the established policy simply begs the question of whether the policy itself was discriminatory as applied in her case. Because PMA's summary judgment motion did not address that question, summary judgment was improper.

As noted, PMA's concession that Pelayo could establish a prima facie case of "regarded as" disability discrimination was for purposes of its summary judgment motion and this appeal only. The issue of whether PMA's medical disqualification policy was discriminatory as applied to Pelayo in this case has not been fully briefed or factually developed and thus remains to be decided. Because we conclude the court erred in granting summary judgment on the ground PMA established a legitimate, nondiscriminatory reason for Pelayo's termination, it is unnecessary to reach the issues of whether the court erred by addressing Pelayo's failure-to-accommodate claim in its summary judgment ruling and denying Pelayo's motion for reconsideration.

#### DISPOSITION

The judgment is reversed. Pelayo is awarded her costs on appeal.

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McCONNELL, J.

WE CONCUR:

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McINTYRE, Acting P. J.

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O'ROURKE, J.